The Jicarilla Apache Nation

EXECUTIVE OFFICES

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Jicarilla Apache Reservation
February 11, 1887-1987

May 12, 2006

Original Submitted by Email at IEED@BIA.EDU

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Re: Section 1813 Study of Energy Rights of Way on Tribal Lands
Position Paper of the Jicarilla Apache Nation

Dear Mr. Meyer and Mr. Middleton:

The Department of Energy and the Department of the Interior have set May 15, 2006 as the deadline for submission of information and comments regarding the study being conducted pursuant to Section 1813 of the Energy Policy Act of 2005. Federal Register Notice, Vol. 71, Page 26483, No. 87, Friday, May 5, 2006. The Departments have further encouraged that information and comments be submitted by email to the address indicated above.

Attached to this cover letter you will find the Position Paper of the Jicarilla Apache Nation concerning the Section 1813 Study.

The Jicarilla Apache Nation urges the two Departments to take seriously their trust obligations to the tribes, and to ensure that the report to Congress is based on facts and objective analysis rather than unsubstantiated rumors and speculation. If the Departments do so, we are confident that the Report will inform Congress that the existing laws requiring tribal consent for any right-of-way over tribal land should not be amended in any respect. Those laws are fully consistent with the trust obligations of the United States and with sound national energy policies.

Sincerely,

JICARILLA APACHE NATION

Levi Pesata
President

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May 12, 2006

POSITION PAPER OF THE JICARILLA APACHE NATION
ON
DOE/DOI STUDY OF ENERGY RIGHTS OF WAY ON TRIBAL LAND
[Section 1813, Energy Policy Act of 2005]

A. Introduction

Section 1813(a) of the Energy Policy Act of 2005 requires the Secretaries of Energy and Interior to "conduct a study of issues regarding energy rights-of-way on tribal land." Section 1813(b) of the same Act requires the Secretaries of Energy and Interior to submit to Congress a report on the findings of this study, and further specifies that the report will include the four following subject matter areas:

(1) an analysis of historic rates of compensation paid for energy rights-of-way on tribal land;

(2) recommendations for appropriate standards and procedures for determining fair and appropriate compensation to Indian tribes for grants, expansions, and renewals of energy rights-of-way on tribal land;

(3) an assessment of the tribal self-determination and sovereignty interests implicated by applications for the grant, expansion, or renewal of energy rights-of-way on tribal land; and

(4) an analysis of relevant national energy transportation policies relating to grants, expansions, and renewals of energy rights-of-way on tribal land.

Section 1813 raises issues that are of enormous importance to the Jicarilla Apache Nation. As this Position Paper explains in detail below, the Jicarilla Apache Reservation has been a major producer of natural gas for the last fifty years. Part of the infrastructure necessary for the production of natural gas is the network of pipelines and

compressors that makes up the natural gas gathering system on the Reservation. Each segment of that gathering system is located on an "energy right-of-way on tribal land." Section 1813 therefore could have a significant impact on the Jicarilla Apache Nation.

B. Tribal Control Over Our Remaining Lands is Central to Our Survival as a Sovereign Nation

Before discussing Section 1813 in detail, it is essential that DOE and DOI understand who the Jicarilla Apache Nation is and why control over our Reservation land is a life and death issue for us. The Departments and Congress need to understand that we look at Section 1813 with great suspicion. The Jicarilla Apache people have a long history of dealing with outsiders who want our land, or want to control our land. That experience has taught us that we must be vigilant in protecting the small territory that we still have so that it can provide a homeland for our future generations.

1. The Jicarilla Apache Reservation Now Includes Less Than 2% of Our Original Territory.

Prior to the invasion of our aboriginal lands by Europeans, the ancestors of the Jicarilla Apache Nation hunted buffalo in a territory including most of what is now northeastern New Mexico and southeastern Colorado, totaling 46,000,000 acres. Robert J. Nordhaus, Tipi Rings – A Chronicle of the Jicarilla Apache Land Claim, BowArrow Publishing Co. (1995) (Tipi Rings), at 14. A map showing the aboriginal territory of the Jicarilla Apache people (the "Hibben Line") and the Jicarilla Apache Reservation as of 1994 is attached as Exhibit 1 entitled "Map 1 – Jicarilla Apache Reservation as of 1994." Occupation of this area by the Jicarilla Apache people was continuous during the seventeenth, eighteenth and nineteenth centuries. Tipi Rings, at 39-40. Our ancestors occupied this territory before the Spanish colonists arrived, and long after their arrival.

The Jicarilla Apache people continued to hunt in, farm, and seasonally occupy campsites and villages throughout this area until the United States established a small reservation for the Tribe in 1887, located at the far western edge of our aboriginal territory, in what is now north-central New Mexico. Tipi Rings, at 18-19. The arrival of the Americans is a fairly recent event in our long history, but it resulted in a drastic reduction in our territory.

The United States seized control of New Mexico in 1846 and then legalized the seizure in the Treaty of Guadalupe Hidalgo, signed in 1848. Tipi Rings, at 82. Regular

battles between the Jicarilla Apaches and the United States Army commenced immediately and continued through the 1850's. Tipi Rings, at 82-98. The Jicarilla Apaches entered into a peace treaty with the United States in 1855, which promised to set aside a reservation for the Tribe in northern New Mexico. However:

> Almost immediately after the treaty had been signed, settlers claimed rights to the land that was to be given to the Jicarilla Apaches as a reservation, and as a result the treaty was not ratified by the Senate.

Tipi Rings, at 92. American control of the area traditionally occupied by the Jicarilla Apaches loosened during the American Civil War. As a result our ancestors were able to continue hunting in our traditional areas. Tipi Rings, at 95.

After the Civil War ended and more Americans entered New Mexico looking for land, pressure increased on the United States to move the Jicarilla Apaches to a reservation with fixed boundaries. In 1878 the United States attempted to relocate our ancestors onto the Mescalero Apache Reservation in southern New Mexico, but the Jicarilla Apaches refused to remain there. Tipi Rings, at 97. In 1880 a small area of land was identified by the United States for the Jicarilla Apaches in north-central New Mexico near where our present Reservation is located. A reservation was created by executive order in 1881, but the executive order did not put an end to American avarice for our land. "Hardly had the Indians become established there when powerful interests (settlers and stockmen) once again forced their removal to the Mescalero Reservation." Tipi Rings, at 97.

In 1886 the Jicarilla Apaches made their way back to northern New Mexico in small bands, and settled on land that is now part of our Reservation. A Reservation for the Jicarilla Apaches was set aside by Executive Order on February 11, 1887 and the non-Indians who had settled there illegally were removed. Tipi Rings, at 98. The Executive Order declared that the described land was "set aside as a reservation for the use and occupation of the Jicarilla Apache Indians." The Department of the Interior determined in 1936 that the 1887 Executive Order applied to all lands within the townships listed in the Order, including privately owned lands. Opinion of Interior Solicitor Margold, May 19, 1936.

The 1887 Reservation consisted of approximately 416,000 acres – a tiny remnant of the 46,000,000 acres the Jicarilla Apaches had occupied before the Spanish and the Mexicans arrived. The 1887 Reservation was also a small remnant of the area the Indian Claims Commission ultimately held (in 1963) was unlawfully taken from the Jicarilla Apaches by

the United States: 9,218,532 acres. Commission's Finding No. 60, 12 I.C.C. 439, 467 (1963).

The 1887 Reservation was enlarged by approximately 300,000 acres by Executive Orders on November 11, 1907 and January 28, 1908. Many decades later, in the 1980's, the Jicarilla Apache Nation purchased (with our own funds) approximately 95,207 acres of land adjacent to our Reservation and conveyed it to the United States in trust. Those lands are now part of our formal Reservation. The current Jicarilla Apache Reservation contains 879,716 acres of land and covers approximately 25 miles east to west and 66 miles north to south. All but approximately 90 acres of that land is held by the United States in trust for the Jicarilla Apache Nation. See Veronica E. Velarde Tiller, ed., Tiller's Guide to Indian Country, BowArrow Publishing Co., 2005, at 727. Our remaining land base is less than 2% of our original territory (879,716 / 46,000,000 = 0.019).

2. Protection of Our Remaining Land for Future Generations Was a Principal Reason for Adopting a Constitution Under the Indian Reorganization Act of 1934.

Over the last 300 years, land-hungry outsiders have succeeded in reducing our homeland from 46,000,000 acres to just 879,716 acres. As noted in the 1928 Meriam Report to the Secretary of Interior, encroachment by non-Indians on tribal lands was a widespread, national problem before the advent of the Indian Reorganization Act (the IRA):

> The white population in the Indian country is coming into closer and closer contact with the Indians. This movement appears inevitable and inescapable. As a consequence, the Indians will have less and less opportunity to carry on a moderately independent existence. It is becoming more and more essential for them economically and socially to rise more nearly to white standards. . . [I]t should be noted that frequently the steps taken by the shrewder, more experienced whites to deprive the Indians of their lands are unethical, if not actually criminal. They get the Indian property at a fraction of its true value. . . With little or no means of determining the real value of his property and with a very real sense of immediate need of food and clothing, [the Indian] falls an easy victim.

Meriam Report, ch. 4 (Institute for Government Research, 1928). The Meriam Report was a principal basis for the enactment of the IRA in 1934.

In 1937 the Jicarilla Apache people responded to the IRA by adopting a Constitution under Section 16 of that Act. Our Constitution was amended in 1962, 1968, 1990 and 2000 and has been duly approved by the Secretary of the Interior.

In light of the Jicarilla Apache Nation's history, briefly summarized above, it is not surprising that our Constitution expressly recites the central importance of protecting the remaining tribal land for future generations. The Preamble of the Revised Constitution of the Jicarilla Apache Nation states:

> We, the members of the Jicarilla Apache Tribe, by virtue of our sovereign rights as an Indian tribe and pursuant to the authorities conferred by the Indian Reorganization Act of June 18, 1934, (48 Stat. 984), desiring to assume more responsibility for our own well-being, to protect the land and resources of our Tribe for ourselves and our children, and to work with the Government of the United States in administering the affairs of our Tribe, adopt the following constitution, as amended.

Revised Constitution of the Jicarilla Apache Tribe (1962), published in Jicarilla Apache Nation Code, American Legal Publishing Corp. (2005) (Emphasis added). Protecting the remnants of our former lands was not just a side issue. It was a central purpose for organizing our government under the IRA.

Our Constitution is similarly clear that tribal land is not a commodity to be sold to anyone, for any reason. Article XI, Section 1(a)(4) states unequivocally that "[t]he tribal lands shall be inalienable." Revised Constitution of the Jicarilla Apache Tribe (1962), supra. Just as "life, liberty and the pursuit of happiness" are considered inalienable rights to the larger American society, our land is considered an inalienable part of Jicarilla Apache society.

Furthermore, tribal land exists for the benefit of the entire tribe, not for the benefit of any individual. Article XI, Section 1(a)(3) provides that tribal lands may be developed for industrial and other purposes "provided that such development is designed for the general welfare of the Tribe as a whole." Revised Constitution of the Jicarilla Apache Tribe (1962), supra.

The 1887 Executive Order set aside the original reservation land "for the use and occupation of the Jicarilla Apache Indians," not for the use and occupation of pipeline companies or the general public. Similarly, our Constitution makes our tribal land a permanent homeland that must be managed to sustain the Jicarilla Apache people forever. Tribal land is not a commodity that is bought and sold in the marketplace. Tribal control over tribal land – for the perpetual benefit of the Jicarilla Apache people as a whole – is at the very core of the Jicarilla Apache Constitution.

The tiny fraction of our original homeland that we still have must support the Jicarilla Apache people for all generations still to come. The ability to control our own land is essential to our ability to survive as a people.

3. Congress and the Courts Have Re-Affirmed that Rights-of-Way Can be Granted Over Tribal Land Only with the Consent of the Tribal Government.

Tribal control over tribal land has been at the very core of federal Indian policy since the IRA was enacted in 1934. Specifically on the subject of rights-of-way over tribal land, federal law could not be more clear and unambiguous. The act of February 5, 1948, c. 45, § 1, 62 Stat. 17; 25 U.S.C. 323-325 authorized the Secretary of the Interior to grant rights-of-way "for all purposes" – as opposed to earlier statutes that authorized rights-of-way for specific purposes such as telephone and telegraph lines (25 U.S.C. § 319) or pipelines (25 U.S.C. § 321). This general authority to grant rights-of-way was intended to avoid the need to determine whether any of the then-existing statutes authorized a right-of-way for the particular use being considered. See Senate Report No. 80-823, 80th Cong., 2d Sess. 1948, 1948 U.S.C.C.A.N. 1033. The 1948 act was intended to facilitate the granting of rights-of-way over tribal lands, but only in a manner consistent with the federal Indian policy of supporting tribal control over tribal land.

The 1948 Act expressly prohibited the Secretary from granting a right-of-way over lands of a tribe organized under the IRA "without the consent of the proper tribal officials." This reference to the IRA was not an accident. The IRA provided that a constitution adopted under 25 U.S.C. § 476 "shall vest in such tribe ... the following rights and powers: ... to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe."

However, Section 3 of the IRA (25 U.S.C. § 463(b)(4)) suggested that rights-of-way might not be governed by this section requiring tribal consent. See Plains Electric Generation and Transmission Cooperative, 542 F.2d 1375, 1380 (10th Cir. 1976). Congress enacted the tribal consent requirement of the 1948 right-of-way act precisely to correct this possible gap in the IRA, and to preserve the powers of the tribe to control all dispositions of tribal land. Plains Electric Generation and Transmission Cooperative. In light of this clear indication of congressional intent to preserve a tribe's power to control whether a right-of-way will be granted over its lands, the Tenth Circuit has held that the 1948 act impliedly repealed a 1926 act that authorized condemnation of Pueblo lands for public purposes. Id. Allowing the Secretary of the Interior to grant or renew a right-of-way without the consent of the tribe would violate the express language of the 1948 right-of-way act and the fundamental policy of the 1934 IRA – to restore the authority of tribes over their greatly diminished land bases.

The requirement of tribal consent in 25 U.S.C. § 324 was, and is, an integral part of federal Indian policy as established in the IRA. In 1934 Congress promised tribes who re-organized their governmental structures under 25 U.S.C. § 476 that they would have the power to prevent the disposition or encumbrance of their lands. Congress re-affirmed that promise by requiring tribal consent for rights-of-way granted under the 1948 act.

In 1951 when the Department of Interior reviewed proposed revisions to Code of Federal Regulations Part 256, Granting of Rights-of-Way over Indian Lands, the protection of Indian land for the benefit of the Indian land owners was a paramount concern:

> It must be remembered that we are not dealing here with public lands, which are owned by all the people and, hence, may appropriately be administered from the standpoint of achieving the greatest good for the greatest number of the public at large. The beneficial ownership of Indian lands is vested in the Indians themselves. In exercising control over such lands, the Secretary of Interior acts for the Government in its capacity as guardian for Indian tribes and for individual Indians in relation to their trust or restricted property. Consequently, I believe that the Secretary's actions in the discharge of his functions respecting Indian lands ought to be motivated by considerations relating to the welfare of the Indians or relating to the interests of the Government.

Solicitor Memorandum - M-36095, Mastin G. White to Secretary of Interior, August 6, 1951. Based on this analysis the Solicitor concluded that the Secretary should not condition rights-of-way for oil or gas pipelines on an agreement to operate the pipeline as a common carrier:

> The imposition of a common-carrier requirement in connection with the granting of rights-of-way across Indian lands for oil or gas pipe lines would not be in furtherance of the interests of the Indians or in furtherance of the interests of the Government. Instead, the purpose of such a requirement would be to promote the interests of the prospective shippers of oil or gas.

Id. In other words, the United States has a trust obligation to manage pipeline rights-of-way over tribal land solely for the welfare of the tribe, and not for the benefit of anyone else.

The Jicarilla Apache Nation chose to accept the provisions of the IRA and adopted a Constitution under 25 U.S.C. § 476 that was approved by the United States government. Article XI–Section 1 of our Revised Constitution provides that the inherent powers of the Jicarilla Apache Nation "including those conferred by Section 16 of the Act of June 18, 1934, as amended" are vested in our governing body, the Legislative Council of the Nation. Those inherent powers include the power to prevent the sale, disposition or encumbrance of our tribal lands without the consent of the Legislative Council. The grant of a right-of-way for energy transportation or any other purpose constitutes the sale, disposition or encumbrance of our tribal lands. The Jicarilla Apache people accepted the promise made by Congress in the IRA and the 1948 right-of-way act that the United States will not grant any such rights-of-way over our lands without our consent. That promise should not be broken now.

C. Description of the "Energy Rights-of-Way" on the Jicarilla Apache Reservation.

The principal rights-of-way on the Jicarilla Apache Reservation related to energy production and transportation are the pipeline rights-of-way for the natural gas gathering system on the Reservation. There are now over 2000 active oil and gas wells on the Reservation, all of which are located on tribal trust land, and all of which produce oil or natural gas reserves that are part of the real property held in trust and managed by the United States for the benefit of the Jicarilla Apache Nation. Hydrocarbon production from the

Reservation is primarily natural gas. In recent years, Reservation wells have produced about 22 billion cubic feet (22 BCF) of natural gas each year.

This gas gathering system is an integral part of the infrastructure needed to develop the natural gas resources owned by the Jicarilla Apache Nation and located within the Jicarilla Apache Reservation. The Jicarilla Apache Nation has the strongest possible financial motive to make sure that the gathering system exists on the Reservation and operates in a manner that will optimize the production of the Nation's natural gas. Without the gathering system there can be no production of natural gas, and the Nation would be deprived of its royalty and production tax revenue.

The natural gas gathering systems begin at the wellhead and end at tie-in points on larger transmission lines that move the gas to gas processing plants located outside the Reservation. The tie-in points are generally located on the Reservation or near the West boundary of the Reservation. A small portion of the gathering lines located on the Reservation begin at wells located on non-tribal land to the East of the Reservation and pass through Reservation lands to move the gas West to tie-in points on transmission lines that move the gas to the processing plants. Those off-Reservation wells produce less than 10% of the volumes of natural gas produced on Reservation. The gathering systems are located entirely within the State of New Mexico.

The gathering system pipelines were built by various companies over the period since 1955: including Southern Union Gas Company, Northwest Production Company, Pacific Northwest Pipeline Corporation, El Paso Natural Gas Company, Basin Pipeline, Inc., and numerous others. Ultimately, these pipelines came under the control of two major companies: Northwest Pipeline Company and El Paso Natural Gas Company. The Northwest Pipeline system is now owned by Williams Field Services and related companies, and the El Paso system is now owned by Enterprise Products Partners.

The active rights-of-way for the natural gas gathering systems on the Reservation now total approximately 700 miles in length. As of 1995 the Northwest Pipeline gathering system on the Reservation consisted of approximately 87,000 rods (272 miles) of rights-of-way, and the El Paso gathering system on the Reservation consisted of approximately 116,000 rods (364 miles) of rights-of-way. Based on the number of active oil and gas wells

on the Reservation in 1976 and 1995, the Nation estimates[1] that the natural gas gathering system on the Reservation in 1976 consisted of approximately 136,000 rods (426 miles).

The gas gathering systems were installed section-by-section over the last 50 years, as new wells were drilled and gas needed to be transported to processing plants located outside of the Reservation. In connection with pending litigation between the Jicarilla Apache Nation and the United States[2], the Nation has obtained copies of BIA records of the gathering system rights-of-way. Those BIA records[3] indicate that from 1955 through early 1959 the BIA granted these rights-of-way for terms of 20 years. Beginning in 1959 and continuing until 1974, the BIA records indicate the rights-of-way were granted for a term of 50 years or in perpetuity, even though the statute authorizing rights-of-way for pipelines expressly stated that "the rights of way herein granted shall not extend beyond a period of twenty years." 25 U.S.C. § 321.

As a result of litigation[4] filed by the Jicarilla Apache Nation in 1974, the pipeline companies agreed that their existing rights-of-way would expire on April 4, 1995, and that any new rights-of-way would be granted for terms of 20 years. Based on agreements entered into by the Nation and the right of way holders in 1996, all rights-of-way granted before 1997 and all rights-of-way granted since 1997 now have a term that expires on December 31,

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[1] The gathering lines are constructed after wells are drilled, so the natural gas can be transported to gas processing plants. Therefore, the total length of the gathering system is roughly proportional to the number of producing wells. The number of producing wells in 1976 (1,245) is 67% of the number of producing wells in 1995 (1,857). The Nation has applied the same percentage to the known length of gathering lines in 1995 (203,000 rods) to estimate the length of gathering lines in 1976 (136,000 rods).

[2] Jicarilla Apache Nation v. United States, United States Court of Federal Claims, Docket No. 02-25L.

[3] List entitled "Right of Ways" describing Schedule Number, Right-of-Way Number, Right-of-Way Description and Terms and Authority for schedules 1 through 413 in Fine Name "Rights-of-Way Land Schedule" in File Drawer "Chrono/Resolution – 1985," Jicarilla Apache Agency, Bureau of Indian Affairs, Dulce, New Mexico.

[4] See for example Jicarilla Apache Tribe v. El Paso Natural Gas Company, et al., United States District Court for the District of New Mexico, Civil Action No. 74-1218; Settlement Agreement dated July 22, 1975.

2006. The 1996 agreements are subject to confidentiality provisions, and cannot be disclosed without the consent of the pipeline companies.

D. Specific Comments on Section 1813.

1. The Term "Energy Rights-of-Way" is Much Too Broad and Includes Very Different Kinds of Right-of-Way That Cannot Rationally be Treated as if They Were the Same.

One of the most glaring defects in Section 1813 is its failure to provide any definition for the key term "energy rights-of-way." The term is so broad that if read literally it would include at least the following kinds of right-of-way:

- Local gas gathering pipelines from wells to transmission line tie-in points within the gas field,
- Intrastate gas transmission lines from gathering system tie-in points to processing plants,
- Intrastate and interstate gas transmission pipelines from gas processing plants to an industrial end user or gas distribution system,
- Local gas distribution system pipelines (the consumer delivery system),
- Local oil gathering lines from wells to transmission line tie-in points or tank batteries within the oil field,
- Intrastate oil transmission lines from gathering system tie-in points to a refinery,
- Intrastate and interstate refined product pipelines from a refinery to distribution terminals,
- Intrastate and interstate high voltage electric power lines from a generating station to transformer stations,
- Local low voltage electric power lines to consumers,
- Coal slurry pipelines,
- Roads for hauling oil from wellhead storage tanks to a refinery,

- Roads for hauling coal from a mine to a coal-burning facility.

These different kinds of right-of-way all are related to the transportation of energy, but otherwise they are very different from one another in terms of their ownership, their economics, the nature and extent of federal regulation, and the nature of the tribe's interests in the activity taking place on the right-of-way. It is wholly unreasonable, and entirely erroneous, to assume that each of these different kinds of "energy" rights-of-way raises the same issues or can rationally be addressed by Congress in the same manner.

For example, a natural gas gathering system located on tribal land may be owned by a larger corporation that also produces, processes and markets natural gas and natural gas liquids. The gathering system is simply one component of a vertically-integrated enterprise that derives revenue from each level of business activity from the wellhead to the burner tip. That gathering system is not licensed or regulated by the federal government. The owner of that gathering system decides through private contracts with gas producers what it will charge for its services – free of any federal regulation or controls. A principal beneficiary – if not the principal beneficiary – of the gathering system on tribal land will almost certainly be the tribe itself, since the tribe is the land owner and mineral owner whose gas is being transported. The tribe, therefore, has a very strong interest in making sure that the gathering system continues to operate, and operates efficiently.

In contrast, a right-of-way that is used solely to allow an interstate, high-voltage electric power line to pass through tribal land has little if anything in common with the natural gas gathering system described above. That power line operates as a comprehensively regulated utility. If the tribe is not involved in the production of the electricity or the consumption of the electricity, the tribe's interests in the power line will be very different from those described above.

This point is not to say that DOE and DOI should recommend some sort of Congressional action dealing with federally-regulated, interstate electric power lines that transport power through tribal land if that power is not produced or consumed on the tribe's land. The point is that the text of Section 1813 fails to recognize that "energy rights-of-way" is much too broad a category and includes a wide range of different situations that have little or nothing in common. ***DOE and DOI should report to Congress that "energy rights-of-way on tribal land" is not a homogeneous category, and that Congress should not enact any legislation that assumes otherwise.***

The lack of any rational definition of the key term "energy rights-of-way" is not surprising. Section 1813 was added to the Energy Policy Act of 2005 at the last minute, without public hearings, and with very little attention to drafting. DOE and DOI cannot assume that Congress has already made any finding or reached any conclusion that "energy rights-of-way" is a meaningful category. To the contrary, ***DOE and DOI have a responsibility to report to Congress that the hastily drafted language of Section 1813 erroneously suggests that all "energy rights-of-way on tribal land" raise the same issues. DOE and DOI should inform Congress that this is clearly not the case. DOE and DOI should recommend that before Congress even considers any legislation in this area, this key term must be refined and narrowed in a way that corresponds to the realities and complexities of the very wide array of rights-of-way on tribal land that have some connection with energy production, transportation, or consumption.***

2. DOE and DOI Must Not Accept as True the Unsupported Assertion that the Tribal Consent Requirement Has Had a Material Adverse Effect on the Availability or Cost of Energy to Consumers.

It must be remembered that, before enacting Section 1813, Congress did not conduct a single public hearing on the question whether the tribal consent requirement has had a measurable impact on energy availability or price. There was no public testimony that any Indian tribe anywhere in the United States has used the tribal consent requirement to cut off the flow of any form of energy to any consumer. Similarly, there was no public testimony documenting the financial impact, if any, on energy consumers resulting from right-of-way payments to tribes. Section 1813 was not enacted to require a more detailed study of a problem that had already been documented to Congress. To the contrary, Section 1813 was the very first (and poorly drafted) effort by Congress to identify what "issues regarding energy rights-of-way on tribal land" may exist.

The public hearings conducted by DOE and DOI in March and April 2006, and the comments submitted to DOE and DOI (as reflected on the Section 1813 website) similarly are devoid of actual evidence that a tribe somewhere has used the tribal consent requirement to cut off the delivery of energy to some consumer. Several tribes, on the other hand, presented evidence that they have used the tribal consent requirement to increase their active participation in oil and gas production within their reservations, and that the supply of energy for consumers has increased as a direct result. ***DOE and DOI should report to Congress***

that there is no evidence that any tribe anywhere in the United States has used the tribal consent requirement to cut off or reduce the delivery of energy to anyone.

Similarly, the energy industry representatives who support the need for the Section 1813 study have not presented any data quantifying the financial impact on energy consumers caused by right-of-way payments to tribe. These energy industry representatives have simply observed that certain costs of regulated utilities are generally passed on to consumers through the rate-making process. That un-remarkable observation provides DOE and DOI no basis for trying to quantify the actual financial impact on consumers of regulated utilities, much less the actual financial impact, if any, on consumers when a non-regulated entity (like a gas gathering company) pays a tribal right-of-way fee.

The only data on financial impact has come from the tribes, and that data shows the impact on consumer prices to be minuscule. (See for example the presentation of the Northern Utes, showing that tribal right-of-way fees represent 4 tenths of 1 percent of the California gas consumer's bill and 5 tenths of 1% of the Salt Lake City gas consumer's bill.) Those right of way payments to tribes are not only minuscule in terms of actual pennies paid by a consumer, they are small in relation to other costs the consumer must pay – such as service charges paid to the utility companies, fees charged by midstream gas marketers, and the cost of the gas itself.

The evidence that has been submitted to DOE and DOI in the public hearings and in written comments demonstrates clearly that some tribes are successfully negotiating with some energy companies to receive higher right-of-way fees than were paid in the past. However, the energy companies have failed absolutely in their strategy to justify their position by asserting injury to consumers. The proponents of Section 1813 have been given ample opportunity to provide real numbers to document the actual impact of tribal right-of-way payments on energy consumers, but they have provided nothing but vague generalities that some right-of-way fees may be passed on to consumers through rate-setting or market forces. That generality applies equally to every cost item on a company's statement of revenues and expenses, and provides no principled basis for singling out tribal right-of-way payments.

DOE and DOI should report to Congress that the financial impact on consumers resulting from right-of-way payments to tribes is very small in absolute amount (a few

pennies on a consumer's bill) and is much smaller than other costs that are included in the consumer's bill without question (such as gas marketer fees, local taxes, energy company profits and energy company compensation to their CEO's).

The lack of any evidence that either the availability or price of energy to consumers has been harmed by the tribal consent requirement goes directly to the fourth topic Section 1813 requires to be included in the report to Congress: an analysis of relevant national energy policies relating to energy rights-of-way on tribal land. There simply is no national energy policy that the federal government will intervene to place artificial caps on the total cost of energy to consumers, much less artificial caps on portions of that total cost that are so trivial they are difficult to measure – such as the cost of right-of-way fees paid to tribes.

Even if there is a generalized national preference for cheap energy, that preference cannot honestly be used to justify the imposition of federal price controls on right-of-way fees paid to tribes. If Congress wants to reduce energy prices for consumers, there are much more significant costs Congress could address. The most obvious targets are exorbitant energy company profits and bloated CEO compensation.

3. When the BIA Set Compensation for Rights-of-Way on the Jicarilla Apache Reservation, the Jicarilla Apache Nation Received only a Tiny Fraction of the Economic Value Produced by those Rights-of-Way.

Section 1813 requires the Departments to investigate "historic rates of compensation paid for energy rights-of-way on tribal land." The Nation's records of compensation for rights-of-way granted before 1976 are very spotty. A review of archived files of the Nation's attorneys indicates that in 1955 and 1958 the BIA determined that damages payable to the Nation for gathering system rights-of-way were equal to $1.00 (one dollar) per linear rod. See attached Exhibit 2. These rights-of-way varied in width. Some were 45 feet wide, some 50 feet wide and some 60 feet wide. In addition to the payment of $1.00 per rod, the BIA determined that the damages due to lost pasturage were valued at $10.00 (ten dollars) per acre. Total compensation to the Nation for a group of rights-of-way approved in 1958, totaling 20.94 miles, and covering 128.22 acres, was $7,983 for a twenty-year term. Total compensation therefore equaled less than $1.20 (one dollar and twenty cents) per linear rod – that is, **6 cents per rod per year of the right-of-way**.

The Nation believes the compensation for these rights-of-way was typical for the time period around 1958. However, the BIA set the compensation during this time period, with little or no involvement by the Nation. Therefore, the BIA will have to provide documentation of the compensation it required for rights-of-way other than the 20.94 mile segment reflected in the Nation's records.

As described above, the natural gas gathering system on the Reservation in 1976 was constructed on rights-of-way totaling approximately 136,000 rods (426 miles). The Nation's records show that the pipeline companies paid $2.50 per rod in 1976 for a 20-year renewal of gathering system rights-of-way. This is the amount of compensation set by the BIA as "fair market value" of the rights-of-way.

The Nation therefore estimates that the pipeline companies paid approximately $340,025.00 for rights-of-way totaling 426 miles in length for the period 1976 to 1995. This amount was paid in a lump sum at the beginning of the term, but if spread over the 20-year term, averaged approximately $17,000.00 per year.

These rights-of-way allowed the pipeline companies to install and operate the gas gathering systems on the Reservation. During most of the period from 1976 to 1995 (i.e., through 1992) the pipeline companies purchased the gas at the wellhead, transported it to gas processing plants, and sold the processed gas and liquids (propane, etc.). After 1992 when FERC issued Order No. 636 requiring the pipeline companies to separate their transportation services from their sales services, the pipeline companies did not directly purchase the gas from the producers, but charged for various services provided in transporting and processing the gas.

The wellhead value of the gas produced by Reservation wells into this gathering system was approximately $1,266,382,200.00 (1.266 Billion Dollars) during the period 1976 to 1995. See attached Exhibit 3. Therefore, for the period 1976 to 1995, the compensation to the Jicarilla Apache Nation for the rights-of-way used to gather natural gas produced on the Reservation was less than 3/100 of 1% of the wellhead value of the gas gathered from the Reservation wells:

Right-of-Way Compensation to Nation: $340,025.00

Wellhead Value of Gas Gathered:	$1,266,382,200.00
ROW Compensation ÷ Value of Gas =	0.0002685

It is clear that the right-of-way payments fixed by the BIA as "fair market value" reflected only a minuscule fraction of the value of the economic activity taking place on those rights-of-way – i.e., the purchase and transportation of natural gas produced on the Jicarilla Apache Reservation. This economic activity could not have taken place without the Nation's consent to the use of tribal trust land by the pipeline companies. Yet, the contribution of that essential asset (land) resulted in only nominal payments to the Nation when compared to the revenues generated by that land use.

4. The Standards for Determining the "Fair Market Value" of Private Land Have No Application to the Valuation of an Energy Right-of-Way Over Tribal Land.

The energy companies that believe tribes are requesting excessive compensation for the use of tribal land have told the Departments that tribes seek compensation that is more than the so-called "fair market value" of a right-of-way. Those energy companies assume that the "fair market value" of private land is the correct benchmark for deciding whether payments to tribes are "excessive." This assumption is fundamentally wrong, and should be expressly rejected by the Departments. Standard appraisal techniques for private land are not intended to apply, and do not apply, to land that has the unique legal attributes that attach to tribal trust land.

First, appraisal standards are not scientific or religious truths – they are the result of policy decisions that are reflected in laws. This fact is expressly acknowledged by the United States Department of Justice:

> The appraisal of property for purposes of direct voluntary purchase, exchange, or eminent domain by the United States presents unique problems not ordinarily encountered in appraisals for sale, tax, mortgage, rate-making, insurance, and other purposes. This results naturally from the fact that the method of appraisal, the elements and factors to be considered and the weight

> given them, and the standards of valuation are determined to a great extent by law.

"Uniform Appraisal Standards for Federal Land Acquisitions," The Appraisal Institute (2000) (the UAS-FLA), p. 1. Therefore, it is essential to clearly identify the policy choices and legal standards that dictate the appraisal standards that are to be applied in a particular context.

For example, the legal standards that are reflected in the UAS-FLA are based on a basic policy "to impartially protect the interests of all concerned." UAS-FLA, at 6. That policy in turn is based on the Fifth Amendment's prohibition against the taking of private property for public purposes without just compensation. The UAS-FLA therefore reflects the policy of ensuring that compensation is "just" both for the property owner and the general public who pays for the acquisition of that property out of public funds.

Valuation of the contractual right of a private energy company to use tribal trust land raises very different policy considerations. Tribal trust land is not private property; it is the public property of a sovereign government for which the United States is the trustee. Further, the Fifth Amendment does not establish any federal policy of protecting the private funds of privately-owned energy companies. Appraisal standards that are designed to strike an equal balance between a private property owner and the public fisc simply have no application to the valuation issue raised by Section 1813.

Second, the specific legal standards that have developed under the policy of the Fifth Amendment cannot properly be applied to the valuation of tribal trust land for use by private energy companies. For example, the UAS-FLA has adopted the principle that the appraiser should completely disregard elements such as "an owner who may not want to part with his land because of its special adaptability to his own use." UAS-FLA, at B-30. For policy reasons that are appropriate for federal condemnations of private property, the appraiser should give no value at all to the facts that the property owner does not want to part with his property or that the property has unique value for that property owner.

Acquiring a property right in tribal trust land or a contractual right to use tribal trust land presents an entirely different legal situation. The lands comprising the Jicarilla Apache

Reservation are inalienable as a matter of both federal and tribal law. The appropriate standards for determining the value of the use of tribal trust land must reflect the fact that the land is not available for voluntary sale because federal law prohibits its sale, not simply because the owner chooses not to sell it. Furthermore, the unique value of tribal trust land to the tribe is not at all comparable to the personal preferences of a private landowner for a particular tract of land. As a matter of federal law and federal Indian policy, tribal trust lands have been set aside for the exclusive use of that tribe as a permanent homeland. The tribe has unique cultural, spiritual, legal and political relationships to the specific land that has been set aside for it under federal law. An appraisal standard that ignores the unique value of tribal trust land to the tribe would be inconsistent with the most fundamental aspects of federal Indian law.

Similarly, the appraisal standards adopted by the UAS-FLA determine market value based on the "highest and best use" of the land. See UAS-FLA Sections A-14 and B-3. That term of art requires the appraiser to consider only "economic" uses of the land, i.e. uses that constitute productive economic activity:

> The appraiser's estimate of highest and best use must be an *economic* use. A non-economic highest and best use, such as *conservation, natural lands, preservation,* or any use that requires the property to be withheld from economic production in perpetuity, is not a valid use upon which to estimate market value. ... Similarly, an appraiser's use of any definition of highest and best use that incorporates non-economic considerations (e.g., value to the public, value to the government, or community development goals) will subject the appraiser's report to disapproval for use for federal land acquisition purposes.

UAS-FLA, at 18 (emphasis in original).

This concept of highest and best use is totally inapplicable to a valuation of tribal trust land. By federal law, the primary purpose of tribal trust land is to provide a homeland for the tribe. While economic activity is one possible use of that homeland, uses for cultural purposes, conservation, preservation, community development, and other non-economic purposes are absolutely essential and federally-sanctioned uses of that land. Consistent with the purposes for setting the land aside for the exclusive use of the tribe, and consistent with

the federal Indian policy of tribal self-determination, the "highest and best use" of tribal trust land should be the use the tribal government decides is most appropriate to provide a permanent homeland for the tribe, whether or not that use is economically productive.

Most fundamentally, the standards for determining market value reflected in the UAS-FLA and in other variations of uniform appraisal standards all share the assumption that land is a commodity that is bought and sold. These concepts of market value treat land as fungible. A landowner who is given "just compensation" for one piece of land can simply go out on the market and buy a comparable piece of land. Whatever validity this legal fiction may have for purposes of federal land acquisitions, voluntary sales, property taxes, mortgage collateral, and other similar purposes, it has no validity in the context of tribal trust land.

Tribal trust land is not a commodity. It is a permanent homeland for the specific tribe for which the federal government set it aside. No one else has any valid claim to the tribe's land or the use of the tribe's land.

Tribal trust land does not exist solely to provide a location for "economic" land uses. It exists to provide a permanent land base on which the tribe can maintain its culture, its religion, its language, its traditions, and a culturally appropriate physical environment for its future generations – as well as economic activity that provides jobs and money for members of the tribe.

The argument that recent payments to tribes for energy rights-of-way are "excessive" is therefore based on the false assumption that appraisal standards for private land are the appropriate benchmark of value for rights of way on tribal land. The Jicarilla Apache Nation contends that neither the law nor sound policy supports the view that valuations based on appraisal standards for private land establish a cap beyond which compensation to a tribe becomes "excessive." Under existing law, the fair market value approach (which uses standard appraisal techniques) sets only a floor for compensation to the tribe, not a ceiling:

> Except when waived in writing by the landowners or their representatives as defined in § 169.3 and approved by the Secretary, the consideration for any right-of-way granted or renewed under this part 169 shall be <u>not less than but</u>

> not limited to the fair market value of the rights granted, plus severance damages, if any, to the remaining estate.

25 CFR § 169.12 (emphasis added).

The Jicarilla Apache Nation contends that the question the Departments should investigate under Section 1813 is whether tribes are receiving a fair share of the economic value generated by the use of their land. The historical record on the Jicarilla Apache Reservation is clear that, by this standard, compensation to the Nation for energy rights-of-way has been grossly inadequate. Between 1976 and 1995 the Jicarilla Apache Nation received right-of-way payments totaling less than 3/100 of 1% of the value of the natural gas produced on the Reservation and flowing through the gathering system on the Reservation.

The Departments should report to Congress that the concept of so-called "fair market value" determined by standard appraisal techniques has no legitimate application to the valuation of tribal trust land, due to the unique legal status of that land. The Departments should also report to Congress that historic payments to the Jicarilla Apache Nation for the use of its land for energy rights-of-way have amounted to a minuscule fraction of the value of the economic activity that has taken place on those rights-of-way.

5. A Tribe That Allows a Non-Tribal Entity to Use Tribal Land Should Continue to Have the Federally-Protected Rights to Negotiate for a Fair Share of the Value That is Generated by That Use of Tribal Land and to Participate in That Use of Tribal Land.

Section 1813 erroneously suggests that a "right-of-way" is the only appropriate relationship between a tribe and an energy company that wants to transport energy across tribal land. Section 1813 then erroneously suggests that the only remaining question is how to set a "fair and appropriate" value for that particular kind of real property interest. Both these suggestions are firmly grounded in an antiquated view of Indian tribes that Congress abandoned as a failure decades ago.

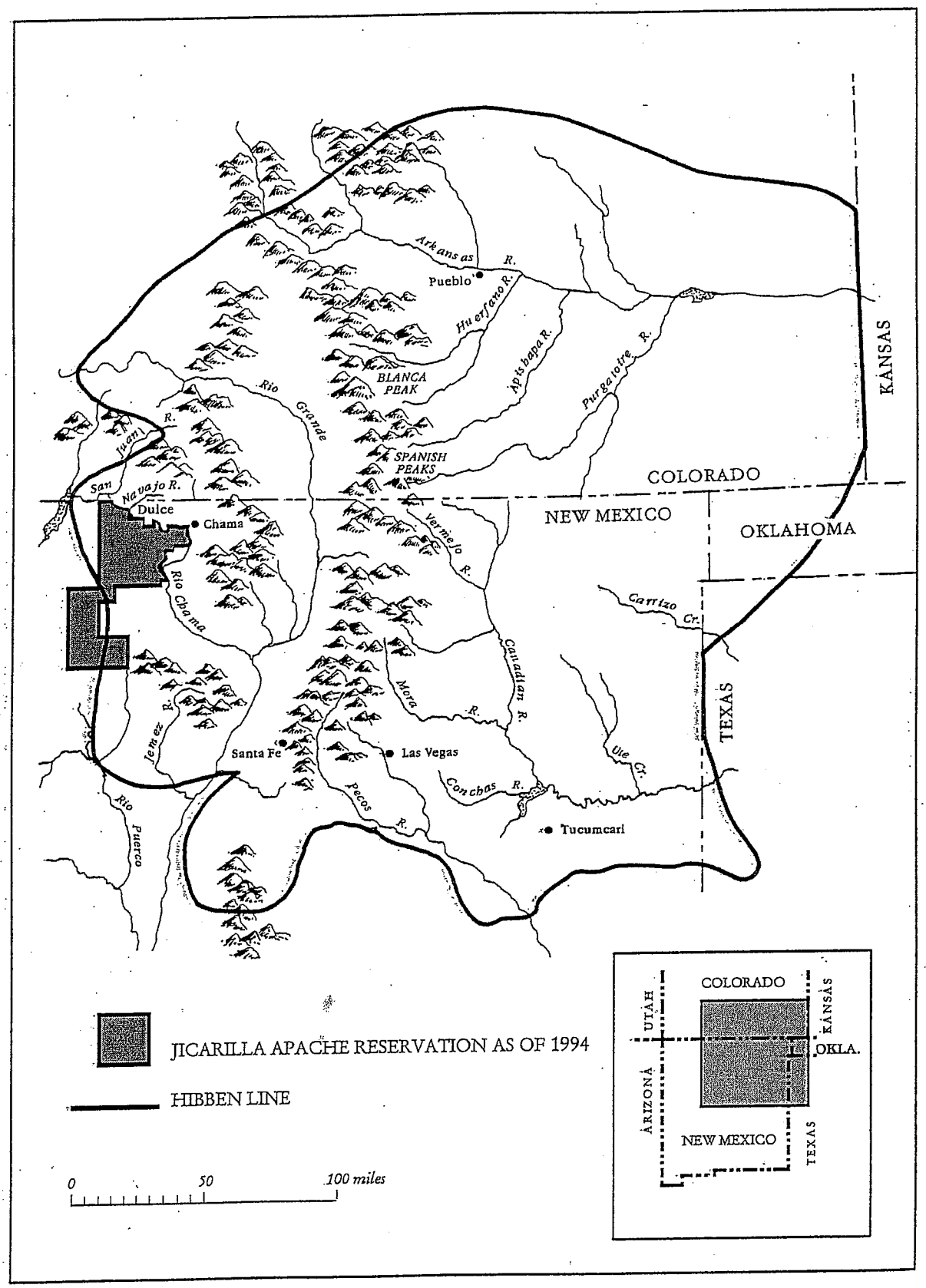
A landowner who has no ability or no desire to participate actively in a potential use of a strip of his land may want to grant a right-of-way to someone else. The right-of-way allows the economic activity to take place, but leaves the landowner in a wholly passive role in that activity. His obligation is simply not to interfere with the activity he has allowed.

This kind of passive role in the area of energy transportation may have been the only realistic option for many tribes 100 years ago, 50 years ago, or perhaps even 10 years ago. Now however, many tribes including the Jicarilla Apache Nation are prepared to participate as active partners in all economic activity on their land – including energy transportation. This is precisely what Congress has encouraged and facilitated since at least 1982, when it enacted the Indian Mineral Development Act, 25 U.S.C. § 2101 et seq.. That Act authorized tribes to enter into "any joint venture, operating, production sharing, service, managerial, lease or other agreement" for the exploration, extraction, processing or other development of mineral resources. 25 U.S.C. § 2102(a). Congress encouraged tribes to participate in the development of mineral resources through business relationships other than traditional mining leases. The gathering and transportation of energy minerals certainly comes within the scope of 25 U.S.C. § 2102(a). It is the established policy of Congress that tribes should have the ability to participate in this economic activity through joint ventures, etc., and not only through traditional rights-of-way.

Tribal self-determination and economic self-sufficiency are the keystone of federal Indian policy. Section 1813, by contrast, seems to assume that the only way a tribe should participate in the energy industry is by approving a right-of-way that lets the energy company make all the decisions, take all the risks, and keep all the financial benefits. Section 1813 makes the erroneous assumption that tribes are capable only of being passive landowners, rather than active business owners.

Section 1813 does not acknowledge that tribes can and should take a more active role in producing and transporting energy on tribal land. Section 1813 ignores the fact that tribes can and should be active partners with the energy industry and not just passive landowners who grant rights-of-way. Section 1813 ignores the fact that Congress has, in the Energy Policy Act of 2005 itself, authorized financial and other assistance to tribes to promote the development of energy resources on Indian land. See Title V, Energy Policy Act of 2005.

The Departments should report to Congress that traditional rights-of-way are not the only option available to a tribe that chooses to allow energy transportation to take place on its land. Other options, such as joint ventures between the tribe and private industry, are better suited to aligning the economic and other interests of the tribe and private industry. Aligning those economic and other interests is a strategy that will advance the construction and operation of energy transportation infrastructure on tribal land. Any effort to restrict the ability of tribes to share in the wealth their lands produce will alienate tribes and create a hostile environment that will undermine efforts of progressive energy companies who understand the most productive ways to do business with tribes.



Map 1
Jicarilla Apache Reservation as of 1994

EXHIBIT 1

EXHIBIT 2

TRIBAL LAND SCHEDULE NO: 15

Schedule and appraisal of damages due the Jicarilla Apache Tribe for gas pipeline right of way of Southern Union Gas Company, Burt Building, Dallas 1, Texas, over and across Jicarilla Apache Tribal lands in Rio Arriba and Sandoval Counties, New Mexico, in accordance with regulations contained in 25 CFR, Part 161.

Southern Union Gas Company Gathering System

Description of Jicarilla Tribal Lands	Facility	Size of Pipe	Width of R/W	Length R/W-Mi.	Length R/W-Rods	Acres in R/W	Value per rod	Total Damages
N/2 Sec. 7, N/2 Sec. 8, SE/4 Sec. 5, all Sec. 4, NW/4 Sec. 3, T-25N., R-5W.; S/2 Sec. 34, N/2, SW/4 Sec. 35, SW/4 Sec. 25, N/2 Sec. 36, T-26N., R-5W.; N/2 Sec. 31, N/2 Sec. 32, N/2, SW/4 Sec. 33, SE/4 Sec. 28, W/2 Sec. 27, SW/4, W/2 Sec. 22, SW/4 Sec. 23, N/2 Sec. 26, W/2, SE/4 Sec. 25, T-26N., R-4W., N.M.P.M.; S/2 Sec. 30, NE/4 Sec. 31, NW/4 Sec. 32, T-26N., R-3W., N.M.P.M., (Rio Arriba Co., New Mexico)	Main Lateral So. Un. Gas Co. Tribal Resol. No. 575 appd. 3/20/56	12-3/4" OD 10-3/4" OD 8-5/8" OD	50'	15.67	5,014.40	94.92	$1.00	$5,014.40
SE/4 Sec. 33, T-24N., R-5W.; all Sec. 4, W/2 Sec. 9, NW/4 Sec. 16, E/2 Sec. 17, T-23N., R-5W., N.M.P.M.(Rio Arriba Co., N. Mex.); E/2 Sec. 20, E/2, SW/4 Sec. 29, T-23N., R-5W., N.M.P.M.(Sandoval Co., New Mexico)	Lateral So. Un. Gas Co. Tribal Resol. No. 690 appd. 8/15/56	8-5/8" OD	50'	5.27	1,686.40	31.92	$1.00	$1,686.40
				Compressor site		1.38		
				20.94mi.	6,700.80	128.22		$6,700.80
Loss of pasturage and to restore the land as nearly as may be possible to its original condition: Cost of seeds and reseeding 128.22 acres @ $10.00 /acre.								1,282.20
							Total damages:	$7,983.00

CERTIFICATE

We hereby certify that the foregoing schedule and appraisement was made by us on August 12 and 14, 1958, and that we verily believe that said appraisement reflects the true value of the damages due the Jicarilla Apache Tribe for the rights of way.

Homer S. Reyer
Real Property Assistant

Leo J. Wade
Land Operations Officer

Approved AUG 26 1958 for a period of 20 years from date construction was authorized on each application or project listed hereon pursuant to the provisions of the Act of February 5, 1948 (62 Stat. 17), and the Department regulations 25 CFR, Part 161 (22 FR 248), subject to any prior valid existing rights or adverse claim and subject to the conditions stated in Tribal Resolutions Nos. 575 and 690.

John B. McCue
Superintendent, Jicarilla Indian Agency
Per authority 25 CFR, Part 161 (22 FR 248)

Natural Gas Production and Wellhead Value
Jicarilla Apache Reservation, 1976 to 1995

Year	MCF	Wellhead $	Total Value
1976	37,684,000	$0.58	$21,856,720.00
1977	41,727,000	$0.79	$32,964,330.00
1978	39,273,000	$0.91	$35,738,430.00
1979	44,177,000	$1.18	$52,128,860.00
1980	45,630,000	$1.59	$72,551,700.00
1981	45,761,000	$1.98	$90,606,780.00
1982	41,815,000	$2.46	$102,864,900.00
1983	37,358,000	$2.59	$96,757,220.00
1984	35,949,000	$2.66	$95,624,340.00
1985	36,084,000	$2.51	$90,570,840.00
1986	25,553,000	$1.94	$49,572,820.00
1987	31,167,000	$1.67	$52,048,890.00
1988	33,407,000	$1.69	$56,457,830.00
1989	34,166,000	$1.69	$57,740,540.00
1990	33,948,000	$1.71	$58,051,080.00
1991	27,111,000	$1.64	$44,462,040.00
1992	34,314,000	$1.74	$59,706,360.00
1993	35,883,000	$2.04	$73,201,320.00
1994	36,160,000	$1.85	$66,896,000.00
1995	36,504,000	$1.55	$56,581,200.00
Totals:	**733,671,000**		**$1,266,382,200.00**

EXHIBIT 3